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In The

Supreme Court of the United States

October Term, 1987

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RICHARD KOONTZ AND BARBARA ANN KOONTZ, ADMINISTRATORS OF THE ESTATE OF STEVEN KOONTZ, DECEASED,

Petitioners,

v.

INTERNATIONAL HARVESTER COMPANY,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTION PRESENTED FOR REVIEW

In a product liability action arising completely within Pennsylvania but commenced by Petitioners in Mississippi and transferred on their motion to the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a), was denial of Petitioners' Rule 60(b)(6) Motion seeking relief from an Order of Dismissal justified either because Mississippi's Statute of Limitations may not be constitutionally applied to revive an action time-barred under the laws of Pennsylvania or because Petitioners' Motion was untimely, and application of the Mississippi Statute after transfer would not be in the interest of justice?

LIST OF PARTIES

Respondent is satisfied with the petitioners' list of parties to the proceeding. Pursuant to Rule 28.1 respondent states that it is now known as Navistar International Transportation Corporation, the parent company of which is Navistar International Corporation.

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OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which they seek to invoke the jurisdiction of this Court.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to those provisions set forth in the petition, this case involves Federal Rule of Civil Procedure 60(b)(6), which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

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STATEMENT OF THE CASE

On June 9, 1979, Steven Koontz and Joel Savage were riding in a 1977 International Scout and were fatally injured in a single vehicle accident that occurred in Lower Moreland Township, Pennsylvania. The Scout was manufactured by respondent, International Harvester Company, now known as Navistar International Transportation Corporation. At the time of the accident, Steven Koontz and his parents, the petitioners here, were residents and citizens of Pennsylvania. The vehicle involved

was registered in Pennsylvania and owned by Reliable Delivery Company, Inc., located in Philadelphia.

The Estate of Joel Savage brought suit against the Estate of Steven Koontz, International Harvester Company, Reliable Delivery and John Matz Truck Service, Inc., a repair facility located in Philadelphia. Another repair facility, Standard Auto Spring Company, also located in Philadelphia, was joined as an additional defendant. In that suit[1] the plaintiffs alleged, as do petitioners in the case at bar, certain defects in design and manufacture of the Scout that allegedly caused a post-collision fire. The Philadelphia law firm of Post & Schell represented the Estate of Steven Koontz in that action. On May 19, 1983 and again on March 13, 1985, petitioners instituted suit in the Court of Common Pleas of Philadelphia against Post & Schell alleging malpractice for failure to institute timely claims against respondent for injuries sustained by their son in the 1979 accident.

On May 15, 1985 petitioners commenced this product liability action[2] against respondent in the United States District Court for the Northern District of Mississippi seeking the application of that state's statute of limita-

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[1] Savage's estate initially filed a lawsuit against International Harvester and a separate suit against the other parties, but the suits were consolidated.

[2] The case at bar is the sixth lawsuit (including the two malpractice actions) that has arisen from the accident. It is the only suit of the six that was filed outside Pennsylvania. Respondent was sued in two of the six. In the actions commenced on behalf of the Estate of Joel Savage, Steven Koontz is identified as the driver of the Scout. In the case at bar, petitioners allege that Joel Savage was the driver.

tions. Miss. Code Ann. § 15-1-49 (1972). Under Pennsylvania law, the action was time-barred. 42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1982).

On November 4, 1985, petitioners filed a motion to transfer the action to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was granted on February 12, 1986 over respondent's objection.

On March 12, 1986, the Mississippi Supreme Court rendered its decision in *White v. Malone Properties, Inc.*, No. 55195, slip op. (Miss. Mar. 12, 1986) and held that Mississippi would no longer apply its six year statute of limitations to claims that "arose factually wholly in another state, and where the center of gravity of the action lies in that other state." *White*, slip op. at 1. Citing *White*, the United States District Court for the Eastern District Of Pennsylvania entered an order of dismissal without prejudice on April 29, 1986.[3]

The Mississippi Supreme Court, acting on a petition for rehearing filed on March 27, 1986, withdrew its first opinion in *White* and substituted a revised opinion on September 24, 1986. *White v. Malone Properties, Inc.*, 494 So.2d 576 (Miss. 1986).

On April 13, 1987, almost one year after the district court's original order of dismissal and nearly seven months after the new opinion in *White*, petitioners filed a Motion for Relief under Federal Rule of Civil Procedure

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[3] The district court's dismissal order expressly noted that "counsel agree that the *White* case controls the outcome of this case." See Appendix at 4a.

60(b)(6). Petitioners sought relief from the order of dismissal based on the substituted opinion in *White*. The motion was filed by counsel for the malpractice defendants but with the concurrence of petitioners.[4]

After briefing and a hearing, the district court entered an order on June 4, 1987 denying the rule 60(b) motion, citing *Ferens v. Deere and Company*, 819 F.2d 423 (3d Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3249 (U.S. Sept. 21, 1987) (No. 87-477). Petitioners appealed to the United States Court of Appeals for the Third Circuit and filed a Petition for Hearing En Banc, which was denied on October 1, 1987. The Court of Appeals for the Third Circuit, citing *Ferens*, affirmed the district court's ruling in an order dated December 15, 1987, 838 F.2d 461 (3d Cir. 1987) (mem.).

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SUMMARY OF ARGUMENT

There are four independent grounds for denying review on certiorari in this case.

First, the Court of Appeals for the Third Circuit in *Ferens* correctly held that a state may not apply its own statute of limitations regardless of the significance of contacts between the forum and the litigation. Accordingly, the court below was correct in affirming the decision of

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[4] Petitioners' counsel of record for purposes of the Petition for Writ of Certiorari continues to represent the malpractice defendants in the suits pending in the state court of Pennsylvania.

the district court. Moreover, the holding in *Ferens* finds doctrinal support in prior decisions of this Court.

Second, this Court need not reach the constitutional question posed by petitioners. The Court of Appeals for the Third Circuit reviewed the district court's order denying petitioners' motion under Federal Rule of Civil Procedure 60(b)(6). In the courts below, respondent contended that petitioners did not meet the requirements for relief under Rule 60(b)(6). The result reached by the court below is supported by other reasons that do not involve constitutional issues.

Third, the asserted conflict between this case and those cited by petitioners is largely illusory. Procedural differences distinguish this case from those cited by petitioners. Also, despite the difference in the due process analysis in *Ferens* as contrasted with *Goad v. Celotex Corporation*, 831 F.2d 508 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3516 (U.S. Jan. 14, 1988) (No. 87-1183) and *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *aff'd on rehearing* 713 F.2d 100 (5th Cir.) & 719 F.2d 785 (5th Cir. 1983), the circuits have not formed precise differences of opinion meriting review at this time.

Lastly, this case is not ripe for review because Mississippi law is unsettled. A substantial question exists as to whether the Mississippi Supreme Court would apply its state's statute of limitations to a case, as here, that has no contact with Mississippi apart from nominal residence of a corporate defendant engaged in interstate commerce.

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ARGUMENT

I. THE THIRD CIRCUIT'S HOLDING IN THIS CASE IS SUPPORTED BY DECISIONS OF THIS COURT.

There is no connection between Mississippi and the case at bar. The decedent was a citizen of Pennsylvania and his estate was raised under Pennsylvania law. The accident occurred in Pennsylvania. The Scout was registered in Pennsylvania, sold in Pennsylvania and titled to a company located in Philadelphia. The lawsuit does not concern any business or activity that respondent conducted in Mississippi. Indeed, the pretext for filing suit in Mississippi and, in addition, seeking application of Mississippi's statute of limitations, rests exclusively upon the respondent's nominal residence in Mississippi by virtue of the fact that it is registered to do business there and has appointed a resident agent.

Relying on *Ferens*, the court below recognized that Mississippi's contact with the parties, the accident and the vehicle are so plainly insignificant that application of the Mississippi statute of limitations would be arbitrary, fundamentally unfair, and, therefore, unconstitutional. Although this same issue was not directly addressed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court there noted the considerable criticism of the traditional choice of law rule that allows a state with little or no interest in an action to apply its own statute of limitations to the controversy. *Id.* at 778 n.10 (citations omitted). Moreover, the holding in the case at bar finds specific doctrinal support in other decisions of this Court. In *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13

(1981) (plurality opinion) this Court noted that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." In *Home Insurance Company v. Dick*, 281 U.S. 397 (1930), this Court refused to allow a state that had no material contacts with the case to apply its statute forbidding parties from limiting by contract the time within which suit could be brought.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court reaffirmed the philosophy of *Dick* and *Hague*[5] and held that a state cannot apply its own law to

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[5] Petitioners contend this Court in *Hague* applied the limitations period applicable in the forum state and attached significance to the fact that Allstate was present and did business in the forum state. However, the fact that Allstate did business in Minnesota was not the sole contact with Minnesota. The plaintiff had moved to Minnesota after the accident and her decedent had been employed in Minnesota and was killed in an accident commuting from his place of employment. Three dissenting Justices strongly disputed whether being licensed to do business in the forum had any significance at all:

> [T]he plurality finds it significant that the insurer does business in the forum State . . . The State does have a legitimate interest in regulating the practices of such an insurer. But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State.

Hague, 449 U.S. 337-338. (Powell, J., Burger, C.J. & Rehnquist, J. dissenting).

Petitioners also cite *Perkins v. Benguet Consolidated Mining Company*, 342 U.S. 437 (1952) but *Perkins* was a question of jurisdiction, not choice of law, and as this Court made clear in *Keeton*, these are two distinct questions. *See Keeton*, 465 U.S. at 778.

claims of class action plaintiffs having no connection with the state. Thus, contrary to the petitioners' suggestion, the Court of Appeals for the Third Circuit has not ruled in a way that conflicts with any prior decision of this Court.

Petitioners also assert the decision in the case at bar conflicts with this Court's prior decisions regarding the effect of a transfer under 28 U.S.C. § 1404(a); but in *Van Dusen v. Barrick*, 376 U.S. 612 (1964), this Court expressly left open the question of what law applies following a transfer by plaintiff under section 1404(a). *See id.* at 640 n.10.[6]

Petitioners' analysis under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) also should be rejected. They assert that the "accident" of diversity should not enable a party to achieve a result in federal court which could not have been achieved in Mississippi state court. In this regard, they contend that had they commenced suit in Mississippi state court, the case would not have been time-barred. Nevertheless, they chose the federal forum and the courts below were free to pass judgment on a federal question, the constitutionality of application of Mississippi's statute of limitations to out-of-state claims. Moreover, by initially filing suit in the Northern District of Mississippi, and then seeking transfer pursuant to 28 U.S.C. § 1404(a), petitioners sought to achieve a result in the Eastern District of Pennsylvania which could not have been achieved had

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[6] Petitioners also argue that *Ferens* conflicts with the reasoning of *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950) but the defendant in *Headrick* was the party who moved for transfer. Thus, *Headrick* is inapposite.

this case been instituted there or in Pennsylvania state court.

II. THIS COURT NEED NOT REACH THE CONSTITUTIONAL ISSUE IN THIS CASE.

A prevailing party may argue any ground in support of a judgment, whether or not that ground was relied upon or even considered by the court below. *United States v. Arthur Young & Company*, 465 U.S. 805, 814 n.12 (1984) (citations omitted). Although the Court of Appeals for the Third Circuit in the case at bar cited *Ferens* in its judgment order and petitioners seek a grant of certiorari on this basis, there are other reasons that would support the order and do not involve constitutional questions.

A court of appeals reviews the denial of a Rule 60(b) motion only for abuse of discretion. *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978) (citations omitted). In both the district court and on appeal in the Third Circuit, respondent maintained that petitioners' motion was being used as a substitute for an untimely appeal, *Martinez-McBean v. Government of the Virgin Islands*, 562 F.2d 908, 911 (3d Cir. 1977) and was not filed within a reasonable time as required by Rule 60(b). *Yanow v. Weyerhaeuser Steamship Company*, 274 F.2d 274 (9th Cir. 1958), *cert. denied*, 362 U.S. 919 (1960). Further, respondent asserted that a mere change in decisional law does not constitute "extraordinary circumstances" as required by Rule 60(b)(6), *Brown v. Clark Equipment Company*, 96 F.R.D. 166, 173 (D. Me. 1982) and respondent would have been prejudiced if the case were reopened. *Jackson v. Jackson*, 276 F.2d 501

(D.C. Cir.), *cert. denied*, 364 U.S. 849 (1960). Each of these reasons independently supports the result reached by the court below.

III. THE ASSERTED CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS IS LARGELY ILLUSORY.

None of the cases cited by petitioners as in conflict with the decision in this case involve a plaintiff-initiated change of venue under 28 U.S.C. § 1404(a)[7] or the denial of a Rule 60(b) motion. These procedural differences distinguish this case and render petitioners' asserted conflict largely illusory.

Moreover, two of the circuits identified by petitioners as holding views contrary to *Ferens* did not explore due process limitations on choice of law determinations. The Court of Appeals for the Eleventh Circuit in *McVicar v. Standard Insulations, Inc.*, 824 F.2d 920 (11th Cir. 1987) did not discuss any constitutional question, but instead, based its decision on 28 U.S.C. § 1404(a). The Court of Appeals for the Tenth Circuit in *Schreiber v. Allis-Chalmers Corporation*, 611 F.2d 790 (10th Cir. 1979), gave no attention to the relationship between due process considerations and choice of law decisions. *See id.* at 794.

Admittedly, *Cowan* and *Goad* conflict with the due process analysis in *Ferens*, but on closer examination, nei-

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[7] In *Goad*, the case was transferred over plaintiffs' objection. *Goad*, 813 F.2d at 509. *Schreiber* also was transferred on defendant's motion. *Schreiber*, 611 F.2d at 791-92. Ford did not file a motion to transfer in *Cowan*. *Cowan*, 713 F.2d at 103 n.5. The opinion of the Court of Appeals for the Eleventh Circuit in *McVicar* is silent on which party initiated transfer. *McVicar*, 824 F.2d at 920.

ther *Cowan* nor *Goad* attempt to defend as rational a rule that allows a forum state having no interest in a case to routinely apply its own statute of limitations. In both cases, the courts hearkened back to the substantive-procedural distinction.[8] *See Goad*, 831 F.2d at 512-13; *Cowan*, 694 F.2d at 107. The court in *Goad* also did not consider how the rule it espoused serves the "interest of justice" under 28 U.S.C. § 1404(a).

The circuit courts have not given concentrated attention to the precise issue raised by petitioners and therefore, there is no clearly defined conflict meriting review at this time.

IV. MISSISSIPPI LAW IS UNSETTLED AND THIS CASE IS NOT RIPE FOR REVIEW.

In its substituted opinion in *White*, the Mississippi Supreme Court issued a narrow holding based on Louisiana's worker's compensation laws. *See White*, 494 So.2d at 577-79. Importantly, however, the court did not say

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[8] In *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973), the New Jersey Supreme Court rejected the traditional approach in favor of a "significant contacts" analysis:

> We are convinced the time has come, for the reasons previously outlined, to discard the mechanical rule that the limitations law of this state must be applied in every suit on a foreign cause of action. We need go no further now than to say that when the cause of action arises in another state, the parties are all present in and amenable to the jurisdiction of that state, New Jersey has no substantial interest in the matter, the substantive law of the foreign state is to be applied, and its limitation period has expired at the time suit is commenced here, New Jersey will hold the suit barred.

305 A.2d at 418.

that the analysis in its original opinion was incorrect and expressly left open for future consideration any reiteration or modification of application of the six-year statute of limitations to a non-resident defendant. Further, in his concurring opinion, Justice Robertson, author of the withdrawn majority opinion, does not indicate that his colleagues rejected the broader implications of the original analysis. *White* thus can reasonably be read as indicating that the Mississippi Supreme Court is concerned with the application of its statute to corporate defendants involving claims arising solely outside of Mississippi, but has chosen to leave the broader question for another day.

A more recent but as yet unpublished decision of the Mississippi Supreme Court, *Shewbrooks v. A. C. & S., Inc.*, No. 56014 slip. op. (Miss. Aug. 19, 1987),[9] further suggests that the Mississippi Supreme Court remains troubled by its "generous statute of limitations [that] make [its] court highly attractive to dilatory plaintiffs and forum-shoppers." *Shewbrooks*, slip. op. at 4. The court noted further that "we are not eager to see Mississippi become a dumping ground for the nation's homeless litigation." *Id.* at 5.[10]

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[9] A petition for rehearing was filed in *Shewbrooks* on September 14, 1987 and has not yet been ruled on by the court.

[10] Pennsylvania law further complicates the analysis. A Mississippi Court would decline to apply Pennsylvania's statute of limitations only if that statute is, under the law of Pennsylvania, procedural in nature. *McVicar v. Standard Insulations, Inc.*, 824 F.2d 921-922 (11th Cir. 1987). Pennsylvania cannot be easily assigned to the group of states that view statutes of limitations as strictly procedural and, as such, easily discarded when resolving conflicts of law problems. *See Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728, 730 (1971).

Pivotal matters of state law are unsettled and the issues in this case might be resolved in future cases without the need for constitutional interpretation. Accordingly, respondent submits that it would be premature to consider in this case the broad constitutional issue raised by petitioners.

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CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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